No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

JEANNE WOODFORD, Petitioner,

v.

ROBERT FREDERICK GARCEAU, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

DEATH PENALTY CASE

LYNNE S. COFFIN*
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA
221 Main Street, 10th Floor
San Francisco, CA 94105
(415) 904-5600

DENISE KENDALL
775 East Blithdale, No. 530
Mill Valley, CA 94941
(415) 384-0281

*Counsel of Record for Respondent
ROBERT FREDICK GARCEAU

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Pursuant to United States Supreme Court Rule 39, Respondent Robert Frederick Garceau ("Respondent") hereby respectfully seeks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs, and to proceed in this matter *in forma pauperis*.

Respondent is an inmate in the California State Prison at San Quentin. In an Order filed June 26, 1995, the United States District Court for the Eastern District of California appointed Denise Kendall, Esq. and the California Appellate Project as co-counsel to

represent respondent under 21 USC § 848 (q)(4).

Counsel of record, Lynne S. Coffin, was substituted for the California Appellate Project as counsel by the United States District Court for the Eastern District of California as counsel for Respondent on October 13, 1995.

DATED: 7/23/02

Respectfully submitted,

LYNNE S. COFFIN*
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA
221 Main Street, 10th Floor
San Francisco, CA 94105
(415) 904-5600

DENISE KENDALL
775 East Blithdale, No. 530
Mill Valley, CA 94941
(415) 384-0281

BY: _____
DENISE KENDALL

*Counsel of Record for Respondent
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ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DEATH PENALTY CASE

LYNNE S. COFFIN*
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA
221 Main Street, 10th Floor
San Francisco, CA 94105
(415) 904-5600

DENISE KENDALL
775 East Blithedale, No. 530
Mill Valley, CA 94941
(415) 384-0281

*Counsel of Record for Respondent
ROBERT FREDERICK GARCEAU

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STATEMENT OF FACTS

To the extent that Petitioner accurately describes the factual history of this case, Respondent incorporates Petitioner's Statement of the Case. However, Petitioner repeatedly blurs, avoids, and even misstates critical parts of the factual background in order to garner support for their argument. To this extent, Respondent clarifies and accurately restates specific facts of this case.

In an attempt to demonstrate that the provisions of the Antiterrorism Effective Death Penalty Act (AEDPA) govern the case at hand, Petitioner alleges in the procedural history incorporated into their argument that "the appointment of counsel and request for stay of execution was uncontested in this case." Pet. at 9, n. 4. This statement is untrue. In fact, the motion for appointment of counsel and request for stay of execution was fully contested.[1] Petitioner makes this misstatement to support the argument that because Respondent's case involved no adversity prior to the filing of the petition, it did not constitute a "pending case" as defined by the AEDPA and that the AEDPA therefore applies. Petitioner's misstatements are

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[1] On May 2, 1995, the Court issued a Notice of Hearing. On May 12, 1995, the court issued an Order Staying Execution and All Proceedings. On May 12, 1995, Respondent filed an Ex Parte Application for Stay to Permit Appointment of Counsel and Notice of Intention to File Petition For Writ of Habeas Corpus. On June 26, 1995, the court issued an Order Appointing Counsel and Temporary Stay of Proceedings. On August 1, 1995, Petitioner filed a Notice of and Motion to Vacate Stay of Execution. On August 14, 1995, Respondent filed a Specification of Non-Frivolous Issues (incorporating arguments surrounding the improper use of peremptory challenges, and prosecutor misconduct at penalty phase.) On August 15, 1995, Respondent filed Opposition to Motion to Vacate Stay of Execution. On September 19, Respondent Filed Supp. Decl. of Lynne S. Coffin Filed in Support of Petitioner's Opp. to Motion to Vacate Stay of Execution. On October 13, 1995, Court Issued Order Denying Motion To Vacate Stay Of Execution Appointing Counsel, Setting Dates. On November 8, 1995, the court issued an Order Granting An Extension to File Case Budget and Stay of Execution. On December 19, 1995, the court issue an Order Requiring Filing of Petition For Writ of Habeas Corpus and Answer. On June 4, 1996, Petitioner filed their Opposition to Temporary Stay to October 7, 1996 Proposed Order Staying Execution. On June 26, 1996, Respondent filed an Ex Parte Application and Order for Stay of Execution Pending Final Disposition of Habeas Corpus Petition. On July 2, 1996, Respondent filed their Petition for Habeas Corpus. *See* App. G-S.

inadequate attempts to distinguish this case from the precedents favoring Respondent. Petitioner's argument that this case is proper for certiorari review fails to convince due to the limited and finite number of cases to be affected by this waning issue. Moreover, the effect of any outcome of this case is limited since Respondent is already facing another term of thirty two years to life imprisonment.[2]

Petitioner further misleads this Court in the second part of their argument. Although Petitioner admits in the first sentence of their *Teague* [3] argument (Pet. at 12) that "[t]he State did not raise *Teague* until the petition for rehearing filed in the Ninth Circuit and now in the petition for certiorari," Petitioner then proceeds to state that the court, despite "clear notice," failed to apply *Teague*. Pet. at 10; *see also* the court "was expressly on notice" (Pet. at 13), where the court is "expressly on notice" (Pet. at 13), and where "a federal court is on notice" of *Teague* (Pet. at 13). Although Petitioner's initial statement admits that the State did not raise *Teague* in either the district court or on appeal, Petitioner still manages to imply that the Court was somehow "on notice" of *Teague* other than by the fact that the court sua sponte raised *Teague*.

Apart from these improper implications and misstatements of the factual background of this case, Respondent incorporates the factual history of this case as accurately portrayed by Petitioner.

SUMMARY OF ARGUMENT

Both of the issues that Petitioner lays before this Court are wholly inappropriate for certiorari review.

Petitioner first alleges that the court of appeals incorrectly held that this case was pending before the enactment of the AEDPA. The court of appeals decided this issue in line with numerous holdings of this Court. Moreover, given the fact that the issue of what constitutes a

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[2] Respondent was convicted of first degree murder and other crimes and sentenced to prison for a term of 32 years and four months to life. *See* App. T-U.

[3] *Teague v. Lane*, 489 U.S. 288 (1989).

"pending" case under the AEDPA is soon to be a moot issue, this Court should not disturb the numerous holdings of the circuit courts in order to rule on the dwindling number of cases which remain. Given the fact that this issue is soon to become irrelevant, Petitioner's portrayal of this issue as having important consequences is simply unsupportable.

Petitioner also argues that the court of appeals abused its discretion in failing to apply *Teague*. Petitioner ignores the numerous holdings of this Court stating that when the state fails to argue *Teague* until its Petition for Rehearing and Petition for Certiorari, that Petitioner has waived *Teague*, and that the court, under those circumstances, has discretion whether to apply *Teague*.

REASONS FOR DENYING THE WRIT

I. This Court Should Deny The State's Petition For Writ Of Certiorari Because It Is Neither An Appropriate Matter Nor A Matter Of Sufficient Importance For Certiorari Review

This issue is not proper for certiorari review for at least three reasons. One, this Court has already decided this issue, and the holding of the Ninth Circuit in *Calderon v. United States District Court (Kelly),* 163 F.3d 530 (9th Cir. 1998)(*en banc*) and the cases it relies on is both correct and in conformity with this Court's prior decisions. Second, this case finds itself in a highly unusual procedural posture, and the number of similar cases to be affected by this issue is both limited and finite. This issue simply lacks vitality. Therefore, this is not an area of law in need of this Court's authoritative voice, and were this Court to let this issue stand, the national impact would be minimal.[4] Third, however, if this Court were to consider this question, any manner by which this Court decided the issue would result in chaos in the courts. For these reasons, this is neither an appropriate matter nor a matter of sufficient importance for this Court to consider on certiorari review. This Court should deny Petitioner's Writ for Grant of Certiorari.

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[4] This Court has previously decided that this exact issue does not merit review. *See Kelly v. Calderon*, 523 U.S. 1063 (1998), *cert denied.*

A. The Unusual Procedural Posture Of This Case, The Limited Number Of Cases To Be Affected By This Issue, And The Chaos That Would Result If This Issue Were Considered, Make This Case Inappropriate For Certiorari Review

This case is in a highly unusual procedural posture, and is simply not fit for certiorari review. Petitioner argues that since other pre-AEDPA cases remain, that this Court must consider this issue. However, this issue lacks vitality. The actual number of cases to fall into this situation are both few and finite. The atypical history which affects Respondent only occurs where the filing of the petition was on or after April 24, 1996 (post-enactment of the AEDPA), but where there was a Motion for Appointment Of Counsel and Stay of Execution prior to the enactment of the AEDPA. Moreover, in order for this to be an issue that the state would contest, given the less onerous standard under pre-AEDPA legislation, it would have to be a case where the circuit court ruling was in the defendant's favor. Particularly given the fact that at the time the AEDPA legislation was pending, defense attorneys were advised to file their petitions quickly, at this late point in the day, there are bound to be very few cases which fall into this unusual procedural posture. As a result, few, if any, cases will follow in the path of *Garceau*. The issue in *Kelly*, therefore, is a matter which does not merit review on certiorari, due to the finite and rapidly decreasing number of cases to be affected. The mere passage of time will render this issue moot.

Given the minimal national impact of letting this issue stand, this is clearly not an area of law in need of this Court's authoritative voice. On the other hand, the result of this Court considering this issue would be to create havoc in the courts. Any way that this Court decided the issue would result in procedural chaos. If this Court were to agree with Petitioner and find against Respondent, a major issue would develop as to what should be done with the cases which have found themselves in this position. Would they be sent back to the circuit court for review? Would they be sent back to the district court for review? All of the cases in this position would have to be reheard and the circuit court would have to develop and implement a procedural

mechanism to deal with these cases and organize this process. If the district court had treated a case as not falling under the AEDPA, and the circuit court then treated the case as under the AEDPA, total confusion would result. Moreover, if the Court were to disagree with Petitioner, numerous cases would have to be reheard. Such a ruling would result in complete chaos within and between the circuits. And the entire point of having created such confusion and havoc in the courts, would simply be to rule on an issue which is quickly disappearing. Even the cases cited by Petitioner admit that "once all cases in which a petitioner initiated some habeas corpus-related legal action prior to the effective date of the AEDPA have been resolved, the point at which a section 2254 case is filed will become irrelevant." *Williams v. Coyle*, 167 F.3d 1036 (5th Cir. 1999). Petitioner's portrayal of this issue as having important consequences is specious and unsupportable. Petitioner's Petition for Writ of Certiorari should be denied on these grounds alone.

B. The Circuit Court Of Appeal Correctly Decided, In Accordance With The Prior Decisions Of This Court, That This Case Was Pending Before The Enactment Of The AEDPA

Petitioner wrongly alleges that the Ninth Circuit applied the incorrect trigger event for the application of the AEDPA and that this case was not pending before the application of the AEDPA. The court of appeal, in accordance with prior decisions of this Court, has found that the AEDPA does not apply to a federal petition filed on or after April 24, 1996 if there is a motion for appointment of counsel and stay of execution filed prior to that date. *Calderon v. Kelly*, 163 F.3d 530 (9th Cir. 1998, en banc). That court correctly held in *Kelly* that there are two steps that suffice to commence habeas corpus proceedings: one, by filing a habeas corpus petition accompanied by an application for a stay of execution, or two, as endorsed in *McFarland v. Scott*, 512 U.S. 849 (1994), by filing an application for appointment of counsel accompanied by an application for a stay of execution. *Calderon v. Kelly*, 163 F. 3d 530. Petitioner incorrectly argues that the only triggering event for the application of the AEDPA is the filing of the habeas petition. The decision of the circuit court in *Kelly* is in accord with the holdings of this Court, as

reflected by the fact that this Court in *Kelly* previously declined to consider this issue on certiorari review. *Kelly v. Calderon,* 523 U.S. 1063 (1998), *cert denied.*

This Court has held that the AEDPA's provisions do not apply to "cases pending" at the time of the statute's enactment. *Lindh v. Murphy*, 521 U.S. 320 (1997). In determining the meaning of "cases pending," *Kelly* relied on this Court's holdings in *Lindh, Hohn v. United States*, 524 U.S. 236 (1998), and *McFarland.* Although the opinion of the majority in *Kelly* was consistent with the prior line of decisions of this Court, Petitioner argues that the dissent in *Kelly* provides the basis for rejecting the approach taken by the majority with regard to the trigger date of the AEDPA. Petitioner's argument has two main themes. First, Petitioner disputes equating the word "case" as used in *Hohn* with the meaning of the word "case" for purposes of determining whether the provisions of AEDPA apply. Pet. at 7. Petitioner cites the dissent from the majority reasoning in *Kelly,* stating that where a petition has not been filed, there is "nothing that could remain a case." Pet. at 8, citing *Calderon v. Kelly*, 163 F.3d 545. Petitioner also cites the dissent in *Kelly* in support of the second prong of their argument that the holding in *Hohn* is distinguishable from the present facts since a certificate for appealability, as in *Hohn,* involves adversity that the current facts do not. Petitioner bases this argument on the notion that since a stay of execution is *"usually"* granted and since appointment of counsel is "*mandatory,*" and since in the specific facts of this case, the appointment of counsel and request for stay of execution were "*uncontested,*" that no case had been initiated before the enactment of AEDPA. Pet. at 8-9.

Petitioner's argument is meritless on several grounds. Petitioner cannot claim that these proceedings are not and were not adversarial in nature. The grant or denial of a stay of execution is addressed to the *discretion* of the district court, and "is not a ministerial or mandatory act." *Calderon v. Kelly*, 169 F.3d 540. This Court has made clear that capital defendants must raise at least some colorable federal claim before a stay of execution may be entered. *McFarland v. Scott,* 512 U.S. 861. Moreover, as demonstrated above, Petitioner misstates the facts of this case. In August 1995, almost a year before the enactment of the AEDPA, the Motion for Stay of Execution *was* fully litigated. *See supra,* n.1; *see* App. G-S. For Petitioner to argue that the request for stay of execution was uncontested is demonstrably false. Further, Petitioner's attempt

to distinguish *Hohn* on the grounds that because the appointment of counsel is mandatory, a stay of execution will usually be granted is equally inappropriate. The appointment of counsel is not mandatory and could involve adversarial proceedings, although it did not in fact do so in this case.

In addition, Respondent filed, what was at the time required, a Specification of Non-Frivolous Claims, outlining Respondent's specific habeas claims. *See* App L. These claims included allegations of improper use of peremptory challenges, and prosecutorial misconduct at penalty phase. Contrary to Petitioner's argument, by detailing the habeas claims in the Specification of Non-Frivolous Issues, there was clearly something that "could remain a case." The true facts of this case, as misstated and avoided by Petitioner, diffuse the majority of Petitioner's argument which is largely based on a claim that there was no adversity in this case prior to the filing of the petition and nothing that could remain a "case."

Moreover, the decision in *Kelly* is correct and is in harmony with the other decisions of this Court. The cases cited by Petitioner demonstrating a circuit split argue that *Hohn* only stands for the proposition that a motion for appointment of counsel constitutes an appealable case, and that this does not imply that a habeas corpus case has been initiated by the filing of such a preliminary motion. *Williams v. Coyle*, 167 F.3d 1040 (5th Cir. 1999). However, this Court's decision in *Hohn* rejected the contention that the filing of a preliminary motion constituted a threshold inquiry that should be regarded separate from the merits.[5] The tie that binds *Hohn* and *Kelly,* therefore, is that neither an application for appointment of counsel nor an application for a certificate of appealability should be regarded as threshold matters, separate from the merits, but rather as judicial proceedings to resolve cases or controversies.

Petitioner is muddying clear waters. This Court in *McFarland* held that a habeas proceeding is "commenced" by the appointment of counsel. *McFarland v. Scott*, 512 U.S. at

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[5] Moreover, as the dissent in *Williams* argued, given the fact that Congress recognized the need for counsel to prepare the petition for the writ, requiring the actual filing of the petition for the commencement of the proceedings may effectively "deny uneducated, poor petitioners their remedy. The filing of a motion for appointment of counsel is as much as many such petitioners can accomplish without the assistance from an attorney." *Williams v. Coyle,* 167 F.3d 1041; *see also McFarland v. Scott,* 512 U.S. 849.

856-857. Reading U.S.C. section 848 (providing for legal assistance in pre-application capital federal habeas corpus proceedings) and U.S.C. section 2251 (allowing a federal court to enter a stay of execution when a habeas corpus case is "pending") together, the *McFarland* court held that a "case" is "pending" if there is appointment of counsel. *McFarland v. Scott*, 512 U.S. at 858. The "proceeding...pending" language of Chapter 153's stay provision cannot be meaningfully distinguished from the "cases pending" language of section 107(c), which as *Lindh* concluded, "implicitly" governs the applicability of "the amendments to chapter 153." *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).[6] That analysis is reenforced by the Court's decision in *Hohn* that a preliminary pleading filed in a court should be treated as an indivisible part of the overall "case," and which confirmed the analysis in *McFarland* by equating "case" with "proceeding." *Hohn v. U.S.*, 524 U.S. 236. These decisions of this Court led the circuit court to properly conclude in *Kelly* that a petition for appointment of counsel, coupled with a motion for stay of execution, constituted a "pending case."

Although Congress used the word "application" throughout the AEDPA, Congress did not prescribe that the retroactivity dividing line was between "applications" or "petitions" that were "filed" and "applications" or "petitions" that were "not filed." Rather, Congress prescribed that the dispositive consideration was whether there was a "case pending" as of the AEDPA's enactment. The reason Congress chose to use the broader term "cases pending" in section 107(c), the retroactivity provision, instead of the term "application" or "petition," is clear. As this Court had recently held in *McFarland*, although habeas proceedings can be initiated only by the filing of a petition or application, capital habeas proceedings can be commenced by the filing of a request for appointment of counsel pursuant to 21 U.S.C. section 848. By using the words "cases pending," Congress opted for a term that would encompass both methods of initiating habeas corpus proceedings.[6] Moreover, as this Court held in *Hohn*, the words "case" and "cause"

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[6]There is no basis whatsoever to merely assume that Congress was sloppy in its drafting. *See Keene Corp. v. United States,* 508 U.S. 200 (1993) [it is generally presumed that Congress acts intentionally and purposely in using different language in different parts of a statute]. That the terms "cases" and "applications" are not synonymous is confirmed by the fact that they have

are constantly used as synonyms in statues, and that "case" as used in a statue, means a court proceeding, suit, or action. *Hohn v. U.S.*, 524 U.S. 241 (1998); *see also United States v. Brown*, 206 U.S. 240 at 244 (1907) [we must "accept the plain meaning of words"]. Congress's choice of the word "cases" rather than "petitions" or "applications" in section 107(c) harmonized perfectly with this Court's then-recent decision in *McFarland.*

Moreover, this Court's holding in *Slack v. McDaniel*, 529 U.S. 473 (2000) provides further support for the *Kelly* position that a pre-AEDPA *McFarland* application for appointment of counsel triggers the application of pre-AEDPA law. *Slack* holds that an "application for Certificate of Appealability" "commences" an "appellate case" because it "initiates" "proceedings in appellate courts," and "we have described proceedings in the court of appeals as appellate cases." *Id.* at 481-482. Because a *McFarland* application for appointment of counsel similarly "initiates" "proceedings" in the district court, such a filing should be understood to commence a "case" in the district court for purposes of determining the AEDPA's applicability to the district court proceedings. In order for this Court to find for Petitioner and grant this petition for certiorari, this Court would have to find that although a habeas corpus "proceeding" is "commenced," and although a habeas corpus "proceeding" is "pending," that a habeas corpus "case" is not "pending." That is an untenable position for which there is no support. This Court has already decided this issue in *McFarland*, and would have to depart from that holding in order to find for Petitioner in this case.

This Court has repeatedly held that reliance and the reasonable expectations of individual litigants are of paramount concern in assessing the retroactivity of a statute. *Martin v. Hadix*, 527 U.S. 343, 358 (1999); *Lindh v. Murphy*, 521 U.S. at 327-28. This Court's cases stand for the principle that there is a reasonable expectation of parties that once a case develops to a certain point in the litigation that the parties will or will not be covered by the legislation in question, as such a determination clearly affects the decision-making in the litigation. For this reason, this

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obviously different meanings in the four places in the AEDPA where they are directly juxtaposed. *See* e.g. 28 U.S.C. section 2262(c) (limiting a habeas court's "authority to enter a stay of execution in the *case* unless the court of appeals approves the filing of a second or successive *application*" (emphasis added); See also, section 2266(b)(1)(a) and (c)(1)(a) and 2263(b)(3)(a).)

Court held in *Lindh* that the amendments to the habeas corpus provisions would not apply to "cases pending" before the effective date of the AEDPA.

The decision in *Kelly*, and its application in *Garceau*, is in keeping with this Court's prior decisions in *McFarland*, *Lindh*, and *Hohn*. These cases were correctly decided and this Court should not now depart from these holdings to decide what is now a vanishing issue.

II. This Court Should Deny Petitioner's Petition For Writ Of Certiorari Because In The Face Of The State's Waiver Of *Teague*, The Court Of Appeals Correctly Exercised Its Discretion Not To Apply *Teague*

Petitioner wrongly alleges that the court below abused its discretion in failing to apply *Teague v. Lane* 489 U.S. 298 (1989) where the state failed to argue *Teague* both in the district court and on appeal. When the State waives *Teague*, the court has discretion whether or not to apply a *Teague* analysis, which is exactly what the court of appeal did here. Moreover, given the specific facts of this case, the court of appeals properly exercised its discretion in declining to apply *Teague*.

A. When The Court of Appeals Panel Unanimously Considers And Determines In Their Discretion Not To Apply *Teague* When It Was Never Raised By The State, There Is No Abuse Of Discretion

Petitioner wrongly alleges that despite clear notice as to the possible application of *Teague*, the court of appeals ignored *Teague*, and in doing so abused its discretion and demonstrated a split in the circuits' approach to *Teague*. Pet. at 10. Every aspect of Petitioner's argument fails to withstand scrutiny. Petitioner is essentially asking this Court to ignore well established legal principles and find that when the lower court is "on notice" of *Teague*, it is an abuse of discretion not to always apply *Teague*. Petitioner argues that this is an important issue to be decided by this Court. Pet. at 13. However, Petitioner ignores the fact that this Court has already decided this issue in *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), and has just recently

reaffirmed this decision in *Horn v. Banks*, 122 S.Ct. 2147 (U.S. June 17, 2002), by holding that when the state fails to argue *Teague*, there is no duty on the court to apply it. Petitioner misleads this Court by arguing that the court was "on notice" of *Teague*, rather than admitting the lower court considered *Teague* and exercised its discretion in not applying it. In fact, the only real issue is whether Petitioner raised and argued *Teague*, not whether the court of appeals of its own fruition mentioned and considered *Teague*. Moreover, where as here, Petitioner wholly failed to argue *Teague*, this Court has repeatedly made clear that there is no duty on the court to apply *Teague*.

Petitioner also alleges that there is a conflict of decisions between the circuits with regard to when to apply *Teague*. Although there is no direct circuit split, to the extent that one may have developed, this Court has just reaffirmed in *Horn* that in the face of *Teague*-waiver by the state, whether to apply *Teague* sua sponte is a matter for the court's discretion. Therefore, this Court has just decided this exact issue, leaving nothing for this Court to consider in the present case. For all of these reasons, Petitioner's Petition for Writ of Certiorari should be denied.

In line with a consistent string of decisions from this Court, this Court has just held in *Horn* that a federal court hearing a habeas petition may decline to apply the *Teague* doctrine if the state does not argue it, but that if the state does argue that the defendant seeks the benefit of a new rule of constitutional law, that the court must apply *Teague* before considering the merits (affirming this Court's prior decisions in *Caspari v. Bohlen*, 510 U.S. 389 [a "federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim"], *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), and *Schiro v. Farley*, 510 U.S. 222, 228-229 (1994).) Therefore, if the state argues *Teague*, the court has a mandatory duty to apply a *Teague* analysis; if the state fails to argue *Teague*, it is in the court's discretion whether or not to apply *Teague*.

This Court's recent decision in *Horn* is in line with repeated decisions of this Court which have held that the burden of asserting non-retroactivity belongs to the state and not to the federal courts sua sponte. *Hopkins v. Reeves*, 524 U.S. 88, 94 (1998). Although the court raises and applies *Teague* sua sponte when the court believes it is appropriate to do so (*Saffle v. Parks*, 494

U.S. 484 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999); *Spazino v. Singletary*, 36 F.3d 1028, 1041-1042 (11th Cir. 1994)), *Teague* is not a jurisdictional issue, and this Court has repeatedly held that when the state fails to argue *Teague*, it is in the Court's discretion whether to apply *Teague*. *Horn v. Banks*, 122 S.Ct. 2147 (U.S. June 17, 2002); *Caspari v. Bohlen*, 510 U.S. 390; *Schiro v. Farley*, 510 U.S. 228-229; *Collins v. Youngblood*, 497 U.S. 41; *see also Ciak v. U.S.*, 59 F.3d 296, 302-303 (2nd Cir. 1995). Although *Teague* is a heightened affirmative defense to the extent that the Court may raise it sua sponte, like other judicially extended affirmative defenses, the duty is still on the state to assert it before it is incumbent on the court to consider it.

Although the state regularly raises *Teague*, the state can waive *Teague* for whatever reason it chooses, and in fact did so in this case. Petitioner failed to raise *Teague* in the district court and again on appeal. Even when the court of appeals specifically raised the issue of *Teague* at oral argument, Petitioner still failed to argue *Teague* and gave no explanation for its failure to raise it. In fact, the circuit panel was unanimous in its refusal to apply *Teague*. Justice O'Scannlain stated in his dissent from the merits of the decision,

> I would hesitate to forego a *Teague* analysis if the state had only implicitly waived *Teague* by failing to raise it in his briefs.... The state, though, went one step further. Asked at oral argument whether *Teague* applied to this case, counsel for the state lamely replied, "*Teague* has never been raised in this case." When pressed from the bench, and given an opportunity to raise *Teague*, counsel impotently responded, "I don't know why *Teague* has never been raised in this case," but did not in fact raise it.

See App. A.

Although Petitioner claims it did not expressly waive *Teague* (Pet., n.7), the facts show otherwise. Not only did Petitioner fail to raise and argue *Teague*, which in itself constitutes waiver sufficient to relieve the court of its duty to apply *Teague* as a threshold issue, but as even the dissent agreed, Petitioner expressly waived *Teague* when put on notice at oral argument of its possible application and still failed to raise *Teague*. In fact, Petitioner still has not given any explanation for why they have not raised *Teague* until this late hour.

Petitioner misleads this Court by repeatedly claiming that the court below was "on notice"

of *Teague*, implying that under such circumstances the court was either under a duty to apply *Teague*, or at the least, should have applied *Teague*. Although Petitioner is forced to admit that the court was not "on notice" of *Teague* as a result of any of its own actions, Petitioner still misleads this Court by failing to clarify that the court sua sponte raised the issue of *Teague*. Rather than admitting that the lower Court sua sponte raised *Teague*, instead, Petitioner claims: "Despite *clear notice* as to the application of *Teague v. Lane*, 489 U.S. 288 the Ninth Circuit ignored *Teague* ...." (Pet. at 10, emphasis added); "[H]owever, this Court should find that, under circumstances such as exist in *Garceau*, where the court is expressly *on notice* of the application of *Teague*...." (Pet. at 13, emphasis added); and "[A]lthough the State did not itself raise *Teague*, there is no question that the Ninth Circuit was expressly *on notice* as to *Teague*'s application..." (Pet. at 13, emphasis added). Although Petitioner clearly wants to argue that the court was "on notice" of *Teague*, and therefore should have applied *Teague*, Petitioner refuses to admit that the court was "on notice" of *Teague* only because the court raised *Teague* of its own accord.

Petitioner's "on notice" language is entirely inapplicable to this case. This Court's decisions hold that "a federal court may, but need not, decline to apply *Teague* if the State does not *argue* it." *Caspari v. Bohlen*, 510 U.S. 389, emphasis added, applying *Schiro v. Farley*, 510 U.S. 228-229 ["federal courts must address the *Teague* question when it is properly *argued* by the government"]; *Horn v. Banks*, 122 S.Ct. 2147 (U.S. June 17, 2002). Nowhere in this Court's decisions in *Horn* and *Caspari* does this Court hold that the court must apply a *Teague* analysis when the court is "on notice" of *Teague* when the state never once raised or argued *Teague*. Clearly any time the court "may, but need not, decline to apply *Teague*" (*Caspari v. Bohlen*, 510 U.S. 389), the court would be "on notice" of *Teague*. This Court's decisions hold the exact opposite, therefore, of what Petitioner argues, and find that if the state fails to argue *Teague*, the court may decline to apply *Teague*. Petitioner's argument that the court was "on notice" of *Teague* is therefore misleading and irrelevant.

Petitioner further misleads this Court by arguing that the court of appeals failed to "consider" *Teague* (Pet. at i, Question 2A), failed to "address" *Teague* (Pet. at 13, 14), and failed to "apply" *Teague* (Pet. at 15). This specious argument implies that the court of appeals actually failed to consider *Teague*, when in fact that is clearly not the case. Contrary to Petitioner's

claims, the court did consider whether to apply a *Teague* analysis even though Petitioner had, both implicitly and explicitly, waived *Teague* in the district court, in the court of appeals directly in oral argument, and in fact did not raise *Teague* at all until its Petition for Rehearing (which was denied), and then in this Petition for Certiorari. Therefore, although there was no duty on the court to even consider *Teague* since it was never raised and was thereby waived by Petitioner, the court nonetheless did in fact sua sponte raise *Teague*. However, after deliberating on the issue, the court unanimously decided not to apply *Teague*, in part, at least, because even in the face of direct questioning, Petitioner still failed to raise *Teague*. *Garceau v. Woodford*, 275 F.3d 769, 781 (9th Cir. 2001) ["Because the state thus explicitly declined to invoke *Teague*, even when squarely presented with the opportunity to do so, I reluctantly conclude that it is inappropriate to analyze whether the *Teague* bar applies"]. Petitioner's attempt to confuse the issue by simultaneously arguing that the court failed to "consider" and failed to "apply" *Teague* is misleading. Even though under the circumstances of this case the court had no duty to apply *Teague*, the court of appeals did consider whether to apply *Teague* and in its discretion decided not to.

One of the reasons supporting the policy that the state must alert the court to *Teague* before the court is under a duty to consider *Teague*, is so that the court has ample opportunity to make a reasoned judgment on the issue. *Goeke v. Branch,* 514 U.S. 115, 117 (1995)(*per curiam*) [raising *Teague* in district court and appellate briefs and in extended oral argument on appeal suffices to allow the appellate court ample opportunity to make a reasoned judgement]; *see also Lyons v. Stovall*, 188 F.3d 327, 338 (6th Cir. 1999) [the court applied *Teague* stating that sufficient effort had been made to alert the court to *Teague* and provide ample opportunity for the court to make a reasoned judgment]. Here, Petitioner failed to provide, and continues to fail to provide, absolutely any explanation as to why *Teague* had not been raised, and no explanation whatsoever as to why it should apply on these facts. For the court to apply *Teague* under those circumstances would distort the balance between the parties. *Lyons v. Stovall,* 188 F.3d 350 (6th Cir. 1999) ["the appearance of justice is compromised when the court of appeals steps into the role of the state's attorney, raising a defense the state has waived in order to bar relief"]. Moreover, for this Court to sua sponte apply *Teague* could result in undue hardship to

Respondent. Because Petitioner never argued *Teague*, Respondent never briefed the issue. Under these circumstances, the court of appeals correctly exercised its discretion to determine that it would be inappropriate to apply *Teague*.

Petitioner seeks to paint a picture of a split between the circuits with regard to the application of *Teague*. This is a complete fallacy. All of the circuits agree there is no sua sponte duty on the court to raise *Teague*, and that the state can waive *Teague* by failing to raise it. *Lyons v. Stovall,* 188 F.3d 327; *Agard v. Portuondo,* 159 F.3d 98, 99-100 (2nd Cir. 1998) ["*Teague* is not jurisdictional in the sense that a court must invoke it *sua sponte* where applicable"]; *Wilmer v. Johnson,* 30 F.3d 451, 454-55 (3rd Cir. 1994)[respondent waived *Teague* by raising it for first time on appeal in supplemental brief requested by the Court]; *Sinistaj v. Burt,* 66 F.3d 804, 805 (6th Cir. 1995)[respondent waived *Teague* by raising it for the first time on motion to amend district court's judgment]; *Eaglin v. Welborn,* 57 F.3d 496, 499 (7th Cir. 1995); *Blankenship v. Johnson,* 118 F.3d 312, 316-317 (5th Cir. 1992). Petitioner cites absolutely no authority to the contrary. Although by use of selected quotations from *Jackson v. Johnson,* 217 F.3d 360 (5th Cir. 2000), Petitioner attempts to manufacture a split in the circuits, in fact, the decision of the Fifth Circuit is easily reconciled with the court of appeal's opinion in the case at hand.

Jackson stands for the proposition that "absent a compelling, competing interest of justice in a particular case, a federal court should apply *Teague* even though the state failed to argue it." *Jackson v. Johnson*, 217 F.3d 363. In *Jackson*, the state failed to raise *Teague* in the district court, but raised *Teague* on appeal. On appeal, the Fifth Circuit held that the state's implicit waiver of *Teague* in the district court did not prevent the court of appeal from applying *Teague* when the state raised it on appeal. Here, Petitioner failed to raise and argue *Teague* in the district court *and* on appeal, *even* where the reviewing court sua sponte raised the issue. Further, Petitioner is not arguing that the court was prevented from considering *Teague*, but rather that the court of appeals was not only obligated to consider it, but was *obliged* to apply it, notwithstanding the state's waiver. The facts of *Jackson* therefore make it entirely distinguishable from the present case.

Moreover, to the extent that *Jackson* departs from the earlier holdings of this Court, *Jackson* merely states that a court "*should*" apply *Teague*, "absent a compelling, competing

interest of justice." Such an advisory opinion on how the court *should* exercise its discretion is not directly in conflict with this Court's prior holdings and those of the other circuits that the court does not have a sua sponte *duty* to apply *Teague* if the state does not argue it and does not represent a circuit split. However, even to the extent that this decision represents a divergent opinion as to how the courts *should* exercise their discretion, this Court has just resolved any alleged conflict by reaffirming in *Horn* its prior holding in *Caspari* that *Teague* is not a jurisdictional issue, and that whether to apply *Teague* if the state fails to argue it is a matter purely within the court's *discretion*.

Petitioner's argument reveals that the real source of Petitioner's complaint is that the court of appeals exercised its discretion in Respondent's favor. Petitioner is essentially asking this Court to rule on an issue not fit for certiorari review: whether the court of appeals properly exercised its discretion. It can never be cert-worthy to argue that the court has sua sponte failed to exercise its discretion in a certain way. The rules of this Court state that "certiorari is rarely granted when the asserted error consists of... the misapplication of a properly stated rule of law." Sup. Ct. R. 10. There are no conflicts between the circuits with regard to the discretionary nature of the court's ability to waive *Teague* in the face of waiver by the state. Clearly this Court cannot and should not review the exercise of each court's discretion whether or not to apply *Teague* when waived by the state, when the scope of that discretion is not in issue.

Since the court had discretion to consider whether to apply *Teague*, as recently reaffirmed by this Court in its decision in *Horn*, this Court should not review the exercise of discretion to find that the court improperly found that Petitioner waived *Teague* and that *Teague* applied. It is wholly inappropriate for this Court on grant of certiorari to review the exercise of the court of appeals' discretion when the court of appeals acted within the scope of their discretion. It is a factual finding made by the court of appeals that the state never raised *Teague*. Petitioner should not be allowed to now argue that the court of appeals abused its discretion in finding that the state waived *Teague*. Although Petitioner implies that this issue raises important and recurring constitutional questions (Pet. at 15 ["[g]iven the important principles underlying *Teague*, federal courts should not be free to apply or ignore its restrictions at will"]), this Court has just decided in *Horn*, reaffirming a long line of decisions, that in circumstances such as these, where the state

waived *Teague*, the decision to apply *Teague* is a matter for the court's discretion.

For all these reasons, this Court should deny Petitioner's application for grant of writ of certiorari.

B. Since *Teague* Was Already Considered By The Court of Appeals, And Since The Court of Appeals Properly Exercised Its Discretion To Decide Not To Apply *Teague*, There Is No Reason For This Court To Consider Vacating The Lower Court's Decision

Petitioner argues that since *Teague* was properly raised in this petition for certiorari, and since *Teague* is a threshold issue, that the court of appeals decision should be reversed. Petitioner advances wholly inconsistent theories. In the first part of the question, Petitioner argues that the court of appeals failed to consider *Teague*, even though the court was "on notice"of *Teague*, an argument both irrelevant and completely belied by the facts. In the second part of the question, Petitioner now contends, "The prosecution has raised the application of *Teague v. Lane*, 489 U.S. 288 in this petition for certiorari. Despite the late assertion of this issue, the *Teague* issue is now properly before this Court." Pet. at 15. Petitioner's statement that this issue is "*now*" properly before this court contradicts Petitioner's earlier argument that this issue was *already* properly before the lower court and that court should therefore have applied *Teague*.

Although *Teague* is a threshold question when properly raised, Petitioner's argument that this issue is now properly raised in the petition for certiorari ignores the fundamental fact that Petitioner already waived this claim by failing to raise it in the district court, and again on appeal, even in the face of direct questioning as to its applicability. Petitioner has not properly raised *Teague* because Petitioner has simply waited too long to do so. Although Petitioner cites authority allegedly in support of their proposition that they can properly raise *Teague* on petition for certiorari, the authority cited by Petitioner merely explains that *Teague* was not addressed in those cases because it was not raised in the lower federal court or on petition for certiorari. These cases provided only the faintest support for an inference that had the state argued *Teague*

in their petitions for certiorari in those cases that *Teague* would have been applied. In fact, in both of those cases, this Court held that the state had *waived Teague*.

Moreover, Petitioner ignores the entire history of decisions of this Court holding that *Teague* cannot be raised for the first time on petition for certiorari. This court has repeatedly found waiver of *Teague* based on the failure of the state to raise *Teague* in the lower federal courts, and then again on appeal. *Schiro v. Farley, supra*, 510 U.S. 228 [the state can waive *Teague* by failing to make the argument in a timely fashion; court declined to apply *Teague* when it was raised for the first time only after certiorari was granted]; *Godinez v. Moran*, 509 U.S. 397 (1993); *Gilmore v. Taylor*, 508 U.S. 333, 339-340 (1993) [suggesting that the proper time to raise *Teague* is in the district court]; *Collins v. Youngblood*, 497 U.S. at 41; *Hopkins v. Reeves*, 524 U.S. 88, 94 [the Court declined to address *Teague* and instead decided the case on the merits because the state "raised the (*Teague*) argument for the first time in its petition for certiorari"]; *Goeke v. Branch*, 514 U.S. 115; *see also Agard v. Portuondo*, 159 F.3d 99 [court of appeals would not exercise discretion to hear *Teague* argument when the argument was raised for the first time on Petition for Rehearing]. By failing to raise *Teague* in the district court and on appeal in oral argument, Petitioner has waived their right to now raise *Teague*.

Petitioner also argues that comity is a reason that this Court should consider applying *Teague* in this case. However, this argument fails. General policies of finality and comity are the reasons the court has discretion to even consider applying *Teague* in the first place in the face of waiver by the state. Such general underlying policy reasons do not amount to specific reasons why the court in *this* case, should consider exercising its discretion in favor of applying *Teague*. Those considerations exist in all *Teague*-waiver cases and are no more weighty in this case. The reasons for *not* applying *Teague* in this particular case, however, are numerous.

First, consistent with the general approach in civil litigation with regard to waiver and claim forfeiture, and in criminal cases with regard to procedural requirements imposed on defendants, the state, like any other litigant, loses a defense if it fails to raise it. In addition to the policy reasons supporting a finding of waiver when the state fails to argue *Teague* (such as providing the court and opposing party ample opportunity to consider the issue and injustice that could result to the other party from reversing a decision when Petitioner had numerous

opportunities to raise *Teague* and failed to do so), there is the additional, more cynical possibility that Petitioner intentionally failed to raise *Teague* in the hopes of obtaining a favorable determination on the merits, and in the event of a finding that was adverse to its interests, raising *Teague* at that point. *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977); *Granberry v Greer*, 481 U.S. 129, 132 (1987) ["unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding a ... defense in reserve for use on appeal if necessary"]; *Lyons v. Stovall*, 189 F.3d 346.

Absent compelling circumstances, the state should not receive any special treatment and should be held to the same procedural standards as other litigants. The appearance of justice is compromised when the court steps into the role of the state and applies a defense which the state has repeatedly waived. Moreover, it is particularly unfair for this Court to consider applying *Teague* when two courts below have found that a constitutional violation occurred, and, in fact, Petitioner makes no attempt to argue that the decision on the merits was wrong. Although *Teague* is driven in part by considerations of comity, comity also requires that "states not agree to expending substantial amounts of time on the merits of a case, only to argue belatedly that the merits have not been reached." *Agard v. Portuondo*, 159 F.3d 98, 100; *Boardman v. Estelle*, 957 F.2d 1534-37 (9th Cir. 1992). When the court can allow a procedural default to result in a person's execution (*see* e.g. *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983)), it can allow a default to stand in this case where Petitioner knowingly, when repeatedly given the option to do so, failed to raise *Teague*. "This Court has fashioned harsh rules of waiver and claim forfeiture to defeat substantial constitutional claims." *Caspari v. Bohlen*, 510 U.S. 397. If the court is to apply such a harsh approach to waiver in habeas corpus litigation, it should hold Petitioner to the same standard in this case. *Ibid.* "Finality, and its companion, waiver, must run along a two-way street." *Williams v. Dixon*, 961 F.2d 457 at 459 (4th Cir. 1992). Given the circumstances of this case, and in particular, Petitioner's failure to raise *Teague* in the district court and on appeal, the court of appeals properly exercised its discretion in deciding not to apply *Teague*.

Even if there was a *Teague* issue in this case (and if there was, Petitioner repeatedly waived it), this is the not the case in which to now apply it. First, Petitioner never raised *Teague* until their Petition for Rehearing and for Certiorari, and to this day, Petitioner still has not given

any explanation for their failure to raise *Teague*. Second, Petitioner does not even claim to dispute the California Supreme Court's finding of error or the merits of the court of appeals' finding. Since Petitioner apparently accepts those findings as correct, Petitioner cannot argue that there is a comity problem. Third, the instruction given to the jury at trial conflicts so directly with the approved jury instruction, that it is highly unlikely that this issue will ever reappear. For all of these reasons, this case is wholly inappropriate for certiorari review. This Court should deny Petitioner's application for grant of writ of certiorari review.

Respectfully submitted,

LYNNE S. COFFIN*
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA
221 Main Street, 10th Floor
San Francisco, CA 94105
(415) 904-5600

DENISE KENDALL
775 East Blithdale, No. 530
Mill Valley, CA 94941
(415) 384-0281

*Counsel of Record for Respondent
ROBERT FREDICK GARCEAU